Renton Issaquah Freightlines, Inc. *and* Chester Laurent, Petitioner and General Teamsters Local Union 174, International Brotherhood of Teamsters, AFL–CIO. Case 19–RD–3053

May 25, 1993

ORDER DENYING REVIEW

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel, which has considered the Employer's request for review of the Regional Director's Supplemental Decision and Order Setting Aside Election Results and Directing Second Election (pertinent portions are attached as Appendix A).[1] The request for review is denied as it raises no substantial issues warranting review. In addition to the cases cited by the Regional Director and the hearing officer, see *Madison Industries*, 290 NLRB 1226, 1230 (1988).

[1] A copy of the hearing officer's Report on Objection and Recommendations, which the Regional Director adopted, also is attached in pertinent part as Appendix B.

APPENDIX

SUPPLEMENTAL DECISION AND ORDER SETTING ASIDE ELECTION RESULTS AND DIRECTING SECOND ELECTION

Pursuant thereto, a hearing was held on January 5, 1993, before a designated hearing officer, who issued her Report on Objection and Recommendations on January 26, 1993. On February 5, 1993, the Employer filed timely exceptions to the hearing officer's report, with supporting brief, copies of which were served on all parties. On February 16, 1993, the Union timely filed an answering brief in support of the hearing officer's report, copies of which were served on all parties.[1]

The Employer's exceptions are that:

> 1. The Hearing Officer completely misconstrued the ''*West Roxbury*'' case in applying it to the instant matter.
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> 2. The Hearing Officer erroneously concluded that Renton Issaquah Freightlines implicitly threatened employees with a continued shutdown of operations during the laboratory period.

Although it is proper to use prepetition conduct as background information, it cannot, per se, be the basis for setting aside an election. Therefore, since the hearing officer's report clearly differentiates prepetition and postpetition conduct, my review of her report will focus on the postpetition conduct.[2]

The hearing officer found, and based on the record, I affirm her findings, that the Employer told employee Christiansen that it would reopen the business if the Union pulled its pickets or if the Union was voted out.[3] Thereafter, the Employer issued a memo which was either read or mailed to 16–20 employees that stated, inter alia:

> We are not operating because the Union is striking us. If the Union is voted out, the strike will be over. If the strike ends, we will open A.S.A.P. Major accounts have been informed of our circumstances. Many of them are loyal to RIAF[4] due to the good service we have provided them.
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> . . . .
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> We have now been robbed of this by no fault of any one of us. Let's protect all of us from this nightmare happening again in the near future. The Denney family hopes you will vote *NO* to decertify. That will end the picketing and put us all back to work with pride and honesty like we have always had.

The hearing officer properly concluded that the laboratory conditions were destroyed by the Employer linking the decertification of the Union with the end of picketing and employees being put back to work. The Employer clearly communicated that the employees' future employment depended on getting rid of the Union; otherwise the business would remain closed. In *BI-LO*, 303 NLRB 749 (1991), the Board affirmed the judge's decision that the employer had violated Section 8(a)(1) of the Act by conducting a mass mailing and campaign that communicated to employees the idea that if they voted for the Union the store stood a good chance of being closed. In *BI-LO*, the employer only implied that the store would be closed. Nevertheless, a violation was found since the mailing and campaign were designed to inspire in employees a fear of closure in the event of unionization. Significantly, in the instant case employees were specifically told that if they voted the Union out they could come back to work ''A.S.A.P.''

Contrary to the Employer's assertions, *S. M. Lorusso & Sons* is on point with the case here. In addition to the employer violating the law in *S. M. Lorusso & Sons* by stating that it was making an offer the union would never accept, it also violated the law by telling striking employees that they were not going back to work and could blame the union for it. The Board affirmed the judge's conclusion that:

> such remark, at least implicitly, imparts to employees a concept that their representatives are the cause of their predicament. The impression being conveyed is that their relationship with their union representatives has caused the Respondent to become inflexible in its attitude toward resolving the strike. Obviously, such hostility inhibits employees in the exercise of and the pur-

[1] The briefs were duly considered.

[2] The hearing officer's misstatement that the union rather than the employer in *S. M. Lorusso & Sons, Inc*., 297 NLRB 793 (1990), would make an offer that would never be accepted is harmless error inasmuch as it was directed at prepetition conduct which was not the basis for overturning the election.

[3] The hearing officer did not specifically credit or discredit witnesses Christiansen or Denney. Therefore, in reviewing the hearing officer's report I am relying on the testimony of employer witness Denney.

[4] Renton Issaquah Freightlines.

suit of the rights which they are guaranteed under Section 7 of the Act.

Here, as in *S. M. Lorusso & Sons*, the Employer's remarks communicated to employees that the Union had caused it to become inflexible and that whether it resumed operations depended on whether employees decertified the Union.

Hostar Marine Transport Systems, 298 NLRB 188 (1990), cited by the Employer, is distinguishable on the facts. In *Hostar Marine*, Respondent's remarks about ''going under'' or ''farming out the work'' were specifically found to be hyperbole that could not seriously be viewed as a threat by an employee who initiated the conversation about the negotiations and who used his own hyperbole. Here, the Employer did not engage in hyperbole; it told the employees if they decertified the Union, then they could go back to work.

The other cases cited by the Employer all have a similar theme: during a campaign the Employer is allowed to communicate rational arguments supporting its position on the ''untoward consequences of unionization.'' However, as noted in *BI-LO* and *S. M. Lorusso & Sons*, an employer is not allowed to inhibit employees in the exercise of their Section 7 rights by conditioning their employment on decertification.

Therefore, I affirm the hearing officer's findings and conclusions with respect to the Union's objection, and I shall adopt her recommendation to sustain the objection.

Therefore, it is hereby ordered that the election results be set aside and a new election conducted.

APPENDIX B

HEARING OFFICER'S REPORT ON OBJECTION AND RECOMMENDATIONS

The Union's Objection

Laboratory conditions were not present due to the pervasive atmosphere created by the circumstances surrounding the Employer's decisions first to close permanently and then to reconsider such decision. The results were a belief by the bargaining unit employees that the Employer would reopen only if the Union were decertified.

A. Finding of Fact

Prepetition

The Employer is a local cartage company operating in the Puget Sound area. The Union has represented the unit employees since 1935. The most recent collective-bargaining agreement expired on April 30, 1992 (all dates hereafter are 1992 unless otherwise noted). The Union had collective-bargaining agreements with a number of other trucking companies in the same industry which also expired around the same time as the Employer's. In July, the Union reached agreement for a labor contract with several of the other trucking companies. The Union offered this same contract proposal to the Employer. Robert Denney, employer president, told the Union he could not afford the Union's proposal and offered to have the Union examine its books. On August 11 and 13, Denney informed the Union he would have no choice but to close the business if he was forced to accept the Union's proposal.

On August 12 and 13, Denney met with unit employees. According to employee Kevin Christiansen, Denney gave the employees a copy of his last and final offer, stating that this was all he could afford to remain in business. Denney said if he was forced to accept the Union's proposal, he would not be able to operate in a profitable manner and he would have to close the business. Christiansen testified that Denney told employees if the Union went on strike, he could not operate with pickets, that it would be too difficult with the trucks being followed, and it was not good for the customers. Employee Charles Rake attended the August 13 meeting and also testified that Denney said he could not afford the union proposal and it would probably put him out of business.

On August 14, union representatives met with Denney and informed him that the Union would not accept the Employer's last and final offer and that the Union would strike if Denney refused to accept its proposal. Denney refused to accept the Union's proposal, again offering to open his books to the Union. The Union went on strike and picketing began on August 14. Picketing has continued through the date of the hearing.

On August 17, Denney notified the Union that he was permanently liquidating and selling his assets and offered to meet with the Union to bargain over effects of the closure. Denney testified that customers had been informed of the labor dispute and some had switched to other carriers. As of that date, and through the date of the hearing, the Employer ceased operating its business. There was uncontroverted evidence that Denney obtained appraisals on his equipment and operating authority and met with or talked to several prospective buyers.

On September 1, Denney wrote to Union Business Agent Clint Copeland. Denney wrote that while he was still negotiating with potential buyers, it was possible that he would not permanently shut down the business. There was no evidence showing that Denney had any knowledge that a decertification petition would be filed the next day.

Postpetition

The petition was filed on September 2. On September 25, Denney notified the Union that discussions with potential buyers had not been fruitful and the Employer was not permanently discontinuing its business.

Employee Christiansen testified that he was contacted by unit employee George Kruger regarding a meeting to be held at Denney's home on August 16.[3] Christiansen did not attend this meeting. In a September phone call, Christiansen testified that Kruger told him that if the Union was decertified, Denney was going to hire everyone back with seniority and vacation pay. Denney testified that he never authorized Kruger to speak on the Employer's behalf.

Christiansen received two phone calls from Denney. The first was sometime in October to invite Christiansen to an informational meeting at Denney's house. According to Christiansen, Denney said that if he sold the business it would be at a great loss and that with the response he was

[3] On August 14, Robert Denney's wife, Lynda, who is the company bookkeeper, gave unit employees George Kruger and Chester Laurent a list of employees, including addresses and phone numbers. Lynda Denney told them that the Employer needed to stay in touch with the striking employees.

getting from the drivers, he would like to try to open the business after the decertification vote. Nothing was said about what would happen if the Union won the election. According to Denney, he told Christiansen during the conversation that the only way he could open his business was if the Union pulled the pickets or if it was voted out.[4] Denney told Christiansen that he had favorable responses from employees regarding the petition.

In a second phone call in November, Christiansen stated that Denney encouraged Christiansen to vote, no matter which way he chose to vote. Christiansen testified that Denney stated if the decertification went through, he would try to open the business and hire the employees back according to need, at the existing wage.

Neither Christiansen nor Rakes attended meetings at Denney's home. At a November meeting, Denney handed out statement which was read to the 12 to 14 unit employees. The statement was also mailed to six employees who did not attend the meeting. In this statement, the Employer stated that it is ''not operating because the Union is striking us. If the Union is voted out, the strike will be over. If the strike ends, we will reopen A.S.A.P. . . . The Denney Family hopes you will vote *NO* and to decertify. That will end the picketing and put us all back to work with pride and honesty like we have always had.''

B. Analysis and Recommendation

It is well established that an employer can talk to employees about the organizing campaign ''so long as the communications do not carry a threat of reprisal or force or promise of benefits.'' *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618 (1969). Threats to shut down a business if a union is voted in is considered such a threat. *Coradian Corp*., 287 NLRB 1207 (1988); *Overnite Transportation Co*., 296 NLRB 669 (1989).

Prior to the filing of the petition, the Employer had informed the Union that it could not afford to operate its business if it had to accept the Union's proposal. When th Union struck the Employer more than 2 weeks before the petition was filed, Robert Denney told employees that he was not going to operate the business while it was being picketed. Employee Christiansen was told that the reason for this is that it was not good for the customers. In *S. M. Lorusso & Sons, Inc*., 297 NLRB 793 (1990), the Board found an employer violated Section 8(a)(1) by telling employees that the union would not return to the plant because the union had made contract proposals the employer could not accept. The Board affirmed the administrative law judge's decision, in which the judge stated that these remarks had an inhibiting effect on employees and represent a threat to them in the exercise of their Section 7 rights under the Act.

Christiansen had a conversation with fellow unit employee Kruger during which Kruger states that Denney would hire everyone back if the Union is decertified. While the Union claims that Kruger was acting as an agent for Denney, the Union presented no evidence that Denney ever authorized Kruger to speak on the Employer's behalf. The only evidence relied on by the Union is the fact that Lynda Denney gave Kruger half of an employee list because the Employer wouldn't lose contact with striking employees. In *Cream of the Crop*, 300 NLRB 914 (1990), cited by the Union, to show apparent agency, there must be a manifestation by the principal to third parties that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question. This means that the principal intended to cause third persons to believe the agent is authorized to act for him or the principal should realize this conduct is likely to create such a belief. Id. In the current case, the only action relied on by the Union is the fact that Kruger was given half of an employee list. I do not find this action alone is sufficient to show that either Robert or Lynda Denney meant to authorize Kruger to speak on behalf of the Employer to other unit employees. Therefore, statements attributed to Kruger shall be considered hearsay and not credited.

The Union claims that laboratory conditions were not present because of the pervasive atmosphere created by the Employer's decision to permanently close its business and later reconsideration of this decision.

The postelection evidence presented by the Union included a September 25 letter that the Employer was reconsidering its decision to close the business. The Employer presented evidence that it had received an unacceptable offer from a prospective buyer on September 21. Denney also told Christiansen that if Denney sold the business, it would be at a great loss. While Denney noted that he had been encouraged by the unsolicited responses of employees to the decertification petition, the Union presented no evidence to show that this was the reason that the Employer announced it had reconsidered permanently closing the business. However, there was no evidence that Denney ever stated what he would do if the Union on the election.

The Union presented evidence that Christiansen had two phone conversations with Denney. According to Christiansen, Denney told him that the business would reopen if the decertification went through. Denney admits that he told Christiansen that the *only* way the business would reopen was if the Union pulled its pickets or the Union was voted out. In a statement read or mailed to 16 to 20 employees just prior to the election, Denney specifically linked decertification of the Union with the end of picketing and employees being put back to work. In this statement and during the phone conversation with Christiansen, the Employer has implied that if the Union is not decertified, the business will remain closed. In the case of the conversation with Christiansen, Denney admittedly stated that decertifying the Union out was one of the two *only* ways employees can return to work.

When making a determination of the effect of the Employer's comment or conduct among the factors to be considered are the size of the unit, the closeness of the election, and the extent to which reports of the misconduct are disseminated to unit employees. *Rosehill Cemetery Assn*., 275 NLRB 180 (1985). In the present case, there is a close vote. There are only 28 in the bargaining unit. While the Union presented no evidence that Christiansen repeated Denney's comment to other unit employees, Denney testified that a majority of the bargaining unit had received his written statement. Based on the fact that Robert and Lynda Denney personally disseminated the information regarding the consequences of the de-

[4] The transcript incorrectly states on p. 141, L. 1, ''if they were bolted out.'' According to my notes, this should read, ''if they are voted out.''

certifying the Union, I find that the Employer's conduct is not de minimis and has tainted laboratory conditions. See *Airstream, Inc*., 304 NLRB 151 (1991).

Based on the above evidence, I find the Union has met its burden of presenting sufficient evidence that the Employer's conduct during the critical period created a pervasive atmosphere that tainted laboratory conditions. Id. Based on the evidence presented, I find the circumstances are such that the voters or results of the election were affected. Therefore, I recommend that the objection be sustained, the election results be set aside, and a new election be directed.

Summary

As set forth above, I recommend that the Union's objection be sustained, that the election results be set aside, and that a new election be directed.